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81-1034

No.

IN THE

Supreme Court of the United States

STATE OF NEW MEXICO, ex rel RICHARD ROCK,
Petitioner,

v.

HON. HARRY E. STOWERS, JR.,
Respondent.

Appeal From The Supreme Court of the State of New Mexico

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Do the State Courts of New Mexico have jurisdiction for a paternity case filed by a full-blooded Navajo mother who is registered as a member of the Navajo tribe and who seeks to establish paternity for her child whom she enrolled as a member of the tribe when paternity is claimed as to a non-Indian citizen of the State of New Mexico who denies paternity?

2. Does the action of the State Court in granting jurisdiction in a paternity action for a Navajo mother and a Navajo child interfere with the self-governing rights of the Navajo nation and thus violate the status of the Navajo nation tribe of Indians which was recognized by virtue of the fact that the Navajo nation was a party to the Treaty of 1868 and recognized as such by the United States of America?

3. Does the United States of America Department of Interior regulation which expressly states that paternity actions shall be litigated in Tribal Courts, bar jurisdiction by the State Court over Indian paternity suits? Does the public policy of the Indian Child Welfare Act require that the paternity action herein should be within the jurisdiction of the Trial Court?

4. Does the Navajo Tribe Law which expressly states that paternity actions shall be litigated in Tribal Court bar an assumption of jurisdiction by New Mexico State Courts for a Navajo mother who was registered as a member of the Navajo nation?

5. Does the Fifth Amendment right against self-incrimination apply to a paternity action brought under a New Mexico statute, which statute creates a criminal cause of action with provisions for imprison-

ment and fines for non-support and where the allegations of the paternity action if proven would provide the specific proof required for criminal conviction?

LIST OF PARTIES INVOLVED

ESTHER ANTONIO who was the Plaintiff in the action in District Court, Bernalillo County, New Mexico.

RACHEL ANTONIO is the Navajo Child and the subject matter of the Paternity action.

THE HONORABLE HARRY E. STOWERS, Judge of the District Court for Bernalillo County, New Mexico was the respondent in the Supreme Court of New Mexico Writ of Prohibition and is an appellant in this action.

RICHARD ROCK is the appellant herein and Petitioner for the Writ of Prohibition to the Supreme Court of New Mexico and the Defendant in the Bernalillo County, New Mexico State Court.

The Supreme Court of the State of New Mexico is the Court which entered the denial of the Writ of Prohibition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES INVOLVED	ii
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED	2
§ 1901 Findings	4
§ 1911 Jurisdiction, intervention; full faith and credit	5
STATEMENT OF FACTS	7
REASON WHY THE APPEAL SHOULD BE GRANTED	12
State Jurisdiction Would Violate the Treaty of 1868 and the Rights of Congress	12
Jurisdiction Cannot Depend on the Defendant, the Alleged Father, Who Denies It	21
Navajo Tribal Code of Law Expressly Mandates Jurisdiction for Its Own Courts	22
Determination of Blood Relationship Is the Most Fundamental Right of the Indian Tribe	22
The Court Denied the Use of the Fifth Amendment in This Paternity Suit	23
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

FEDERAL CASES: Page

Fisher v. Dist. Ct. of Montana, 424 U.S. 382, 47 L.Ed. 2d 106, 96 S.Ct. 953 (1976) 1, 15, 16

Glickstein v. United States, 222 U.S. 139, 32 S.Ct. 71, 56 L.Ed. 128 (1911) 25

Jones v. Meehan, 175 U.S. 1, 44 L.Ed. 49, 20 S.Ct. 1 ... 17

Kastigar v. U.S., 406 U.S. 441, 32 L.Ed. 2d 212, 92 S.Ct. 1653 (1972) 26

Lefkowitz v. Turley, 414 U.S. 70, 38 L.Ed. 2d 274, 94 S.Ct. 319 (1973) 26

Re Gault, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428 (1967) 26

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L.Ed. 2d 106, 98 S.Ct. 1670 ..... 14, 15, 16, 17

U.S. v. Kagama, 18 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109. 17

U.S. v. Quiser, 241 U.S. 602, 36 S.Ct. 699 (1916) 16

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 65 L.Ed. 2d 665, 100 S.Ct. 2578 (1980) 13, 14

Williams v. Lee, 358 U.S. 217, 3 L.Ed. 2d 261, 79 S.Ct. 269 ..... 12, 14, 15

Worcester v. Georgia, 31 U.S. 515 (1832) 20

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172, 36 L.Ed. 2d 129, 93 S.Ct. 1257, 1262 (1973) 20

STATE CASES:

Abramowitz v. Voletsky, et al., 262 N.Y.S.2d 991 (1965) 26

Barbato v. Tuosto, 38 Misc. 2d 823, 238 N.Y.S.2d 1000 .. 26

Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977) 19, 20

Kaneshiro v. Belisario, 51 Hawaii 649, 466 P.2d 452 (1970) 26

Levine v. Bornstein, 13 Misc. 2d 161, 174, N.Y.S.2d, affd. 7 A.D.2d 995, 183 N.Y.S.2d 868, affd. 6 N.Y.S.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921 26

Table of Authorities Continued

Page

McKelvey v. Freeport Housing Authority, 29 Misc. 2d, 140, 220, N.Y.S.2d 628 26

Natewa v. Natewa, 84 N.M. 69, 499 P.2d 691 13

Nelson v. Dubois, 232 N.D. 54 (1975) 16, 20

Rainbow Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (C.A. 1975) 26

State v. Zamora, 84 N.M. 245, 501 P.2d 689 24

Wilbanks v. Wilbanks, 220 Ga. 665, 141 S.E.2d 161 (1965) 25

OTHER:

Journal of Family Law, University of Louisville, Vol. 19, No. 3 ..... 19, 21

52 Virginia Law Review, 322 (1966), "Use of the Privilege Against Self Incrimination in Civil Litigation" 25

§ 40-5-1 et seq. Article V, N.M.S.A. 1978 ..... 4, 14, 23

Treaty of 1868 between United States and Navajo Nation 2, 12, 22

Amendment V, Constitution of United States 2, 10, 23, 24, 25, 26, 27

28 U.S.C. § 1257 ..... 1, 2, 27

Art. I Sec. 8, Constitution of United States 2

Enabling Act of New Mexico, New Mexico Statutes Annotated 1978, Historical Documents Vol. 1 p. 106 ..... 3, 12, 18, 21

25 U.S.C. 1901 et seq., Indian Child Welfare Act 4, 5, 6, 7, 12, 14, 16, 18, 22

25 C.F.R. § 11.30 ..... 3, 4, 10, 13, 22

Navajo Tribal Code, T. 7, § 133 (1969 Ed.) 3, 10, 22

Resolution CJA-1-5, the Navajo Tribal Council adopted as Tribal Law the regulation of the Department of the Interior contained in 25 C.F.R. § 11.30 .... 3, 4, 22

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JURISDICTIONAL STATEMENT

JURISDICTION

Jurisdiction is asserted under 28 U.S.C. § 1257 (1) (2) (3). The case in the Supreme Court of New Mexico was an original proceeding in Prohibition in the highest court of the State of New Mexico, and is a final judgment. *Fisher* v. *Dist. Ct. of Montana,* 424 U.S. 382, 47 L.Ed. 2d 106, 96 S.Ct. 953 (1976).

The Supreme Court of New Mexico denied relief to the Petitioner on the Petition for Writ of Prohibition on August 19, 1981. The Notice of Appeal was filied in the Supreme Court of the State of New Mexico on September 1, 1981.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. Treaty of 1868 between the United States of America and the Navajo Indians. Said treaty is set out in the Appendix 2a because of its length.

2. The following provisions of the Constitution of the United States of America is involved in this Appeal: Article I, Section 8, provides that "The Congress shall have power . . . To regulate Commerce . . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs.

3. Amendment V of the Constitution of the United States: "No person . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. The provisions of the following Statute of the United States is involved, 28 USCS § 1257, State Courts; appeals; certiorari: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, many be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is

drawn in question or where the validity of a State statute is drawn in question or on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

5. The following provision of the Enabling Act for the State of New Mexico is involved in this Appeal. New Mexico statutes 1978 Annotated, Historical Documents, Volume I, Page 106: Second. That the people inhabitating said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States.

6. The following regulation of the Department of the Interior is involved in the Petition: 25 C.FR. § 11.30 states: "The court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

7. The following provision of the Navajo Tribal code is involved: "By resolution CJA-1-5, the Navajo Tribal Council adopted as Tribal Law the regulation

of the Department of the Interior contained in 25 C.F.R. § 11.30 which states: The court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

8. The following Statutory Provision of the State of New Mexico, Sections of Article V, Illegitimacy and Support, N.M.S.A. 1978, 40-5-1, et. seq., are involved: These provisions are set out in the Appendix 43a because of their length.

9. The following statute of U.S. 25 U.S.C. 1901, et. seq., are involved in this Appeal. Section 1901, subdivision (2) (3) (4) and (5).

§ 1901 Findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(2) that Congress, through statutes, treaties, and the general course of dealing with the Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resources that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from

them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Also involved in this Petition is definition of Jurisdictional Section 1911:

Child Custody Proceedings

§ 1911 Jurisdiction, intervention; full faith and credit

(a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal Law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the

Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State Court proceeding for the foster care placement of, or termination of parental rights to, any Indian Child, the Indian custodian of the child and the Indian child's tribe shall have the right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Under definition of Section 1903, we find the following:

(3) "Indian" means any person who is a member of an Indian tribe.

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

STATEMENT OF FACTS

Esther Antonio, a full blooded Navajo Indian, Appendix, 18a, with a census number in the Navajo tribe, Appendix 19a, filed an action in the State Court of Bernalillo County, New Mexico, to establish paternity and for support for her daughter, Rachel Antonio, who was a Navajo child and had been enrolled in the Navajo nation by her mother, Appendix 22a. Plaintiff admitted that the child Rachel Antonio, was a member of the Navajo tribe of Indians, Appendix 24a.

The Defendant was a Caucasian resident and citizen of New Mexico and had never resided on any Indian reservation.

Suit was filed on April 4, 1979 and an amended complaint was filed on or about August 30, 1979, Appendix 27a. The child, Rachel Antonio, was born May 11, 1975 at Presbyterian Hospital, Albuquerque, New Mexico. A birth certificate from the State of New Mexico, Appendix 49a, on information supplied by the mother, stated that the mother of the child is a Navajo Indian. The name of the father is left blank. The child was always identified with the last name of the mother, Appendix 49a.

According to the mother's attending physician, the child was full term when born on May 11, 1965, Ap-

pendix 36a. The Navajo mother had ancestorial ties as a Navajo and had never rejected her membership in the tribe, Appendix 19a. No written or oral evidence, acknowledging paternity by the Defendant exists, Appendix 27a. Paternity in the Defendant is an issue re time of conception, since half of the period when Plaintiff's doctor said that conception would have occurred was in August 1974 and half in September, 1974. The Plaintiff said she had not been in contact with the Defendant during August since she was on the reservation. Appendix 26a. The case at the present time is at issue awaiting trial in the State Court of New Mexico. The defendant denied paternity.

The mother was registered to vote on the Reservation and not in the State of New Mexico, Appendix 26a.

Her deposition shows her own avowals on Indian membership. Her present allegiance to Navajo customs appears throughout her deposition, Appendix 23a. Her Navajo family relationships are paramount, Appendix 22a.

Defendant filed a motion to dismiss for lack of jurisdiction on the parties and the subject matter, Appendix 28a. Defendant also filed an answer with affirmative defenses of lack of jurisdiction, Appendix 29a. The trial court judge denied the motion, claiming in his decision in open court that:

> "I don't think that the State of New Mexico has delegated to the federal government exclusive jurisdiction over matters involved in this Court in a paternity suit in the State of New Mexico. The exercising sovereignty this state has retained

> and the fact this particular plaintiff has chosen to submit herself to the jurisdiction of this Court, I think is a valid exercise and proper, and your motion to dismiss for lack of jurisdiction is denied."

There are four factual premises which channel the aspect to a simplified issue, which issue is: Is there jurisdiction in the State of New Mexico Courts to determine paternity of a Navajo Indian child, with a full blooded Navajo mother when paternity is denied by a Caucasian resident of New Mexico.

The premises are one: that the statute of the both mother and daughter as being always and everywhere full members of the Navajo tribe is claimed and admitted by all parties, Appendix 33a.

Second it is admitted that the Defendant, the alleged father, is a State of New Mexico resident and never at anytime a member of the Navajo nation.

Third, it is a fact that the Navajo child was conceived when the mother was living at the Reservation, but that relations could have occurred off the reservation, but Defendant denies paternity in any event.

Fourth, the Indian mother Plaintiff's claim for jurisdiction in the State Court are based on the residence of the Indian mother being off the reservation when the suit was filed some four years after the birth of the Navajo child and because the Defendant was a New Mexico resident and perhaps because the Indian child was born off the reservation and at a hospital in Albuquerque, New Mexico, Appendix 49a, and that the Defendant should not be able to escape his obligations under State law.

Plaintiff in her pleadings below admits full tribal membership of both mother and daughter, Appendix 34a, however Plaintiff claims Jurisdiction in the State Court because the Defendant "is not an Indian" and "the cause of action arose outside the exterior boundaries of the reservation", Appendix 27a.

This latter contention must be based on the place of birth which was outside the reservation. The real party to the lawsuit is the Indian child, Rachel Antonio and Defendant has contended that the accident of birth outside the reservation is not an exception of Navajo law contained in the Navajo Tribal Court which provided jurisdiction in the Navajo Tribal Court for paternity actions, T. 7, § 133 of the Navajo Tribal Code, 1969 Ed.

Department of Interior's resolution also requires Navajo Court jurisdiction for a paternity action. Plaintiff admits that there is no issue about the court's "automatic tribal membership" or that the mother is a "full blooded Navajo Indian", Appendix 34a, 25 C.F.R. 11.30.

Petition in Prohibition was denied by the Supreme Court of New Mexico. During discovery procedures Defendant raised the Fifth Amendment to the United States Constitution against self-incrimination based upon possible criminal charges arising from non-support if paternity would be established. Protection against self-incrimination was also a subject of the original proceeding in Prohibition to the Supreme Court of New Mexico since the right to raise the Fifth Amendment was denied in the Lower Court, Appendix 39a. Prohibition was denied regarding the application of the Fifth Amendment to the proceed-

ings. No opinion was issued by the Supreme Court in denying the Defendant's petition for Writ of Prohibition, Appendix 1a. The lower court in denying the Fifth Amendment's use by the Defendant, asserted that the Fifth Amendment is not applicable in a civil action and that the paternity case was a civil action, Appendix 39a.

When applying for employment, the Navajo mother said that she had lived on the Navajo reservation off and on for thirty six years, Appendix 32a.

She was living on the reservation at the ancestorial home at the time when conception would have occurred according to the Navajo mother's doctor, Appendix 35a. She moved off the reservation approximately three months after conception, Appendix 32a, and was residing in Albuquerque when Rachel Antonio was born on May 11, 1975, which was four years before the paternity action was filed. She named herself as the only Plaintiff, and did not make her daughter a party as such.

Defendant filed an original Prohibition action in the Supreme Court of New Mexico asserting lack of jurisdiction in the State Court of New Mexico. The Prohibition action claimed that a Navajo child's paternity must be decided by the Tribal Court, by a law of the Navajo Code and also by virtue of a Resolution of the Department of the Interior that jurisdiction exists in the Tribal Court. The Supreme Court denied the Writ, Appendix 1a.

REASONS WHY THE APPEAL SHOULD BE GRANTED

State Jurisdiction Would Violate the Treaty of 1868 and the Rights of Congress

The basic document is the treaty with the Indians, including the one in question with the Navajos in 1868. There were promises and considerations furnished by the Navajos in return for the obligations assumed by the United States. The Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., expresses a national interest in Indian children and finds expression in this language: "There is no resource that is more vital to the existence and integrity to Indian tribes than their children. Rachel Antonio is a Indian child and although a paternity action as such is not the direct subject matter of the Indian Child Welfare Act, nevertheless she is of the class towards whom the congressional "Declaration of Policy" § 1902, supra, is directed. In the judicial field, this Court has been equally interested and sensitive to the Indian child and its protection as a member or potential member of an Indian tribe. Legal efforts of the present time build on legal and judicial labor of the past and need not be concerned with any debate as to the attitude of the Federal Judiciary. Present efforts can be directed towards eliminating an individual case situation that tends to undermine tribal integrity.

In recent years decisions from this court have recognized the necessity of restraint upon state authorities in commercial matters, *William* v. *Lee,* 358 U.S. 217, 3 L.Ed. 2d 261, 79 S.Ct. 269. The State of New Mexico by its Enabling Act (36 Statutes at Lage 557, Chapter 310), rejected Indian jurisdiction.

Within the field of domestic relations, the New Mexico Supreme Court in 1972 spoke in *Natewa* v.

Natewa, 84 N.M. 69, 499 P.2d 691 and cited the Department of Interior's resolution that the Court of Indian Offenses shall have jurisdiction of all suits brought to determine the Paternity of the child and to determine the support of a child. The Department of Interior Resolution 25 C.F.R. 11.30, quoted with approval therein reads: "The Court of Indian Offense shall have jurisdiction of *all* suits brought to determine paternity of a child and to obtain a judgment for the support of the child." Italic supplied.

This Federal Rule, supra, clearly indicates the exercise of the Federal Government's preemptive right in Indian matters arising from a Treaty of the U.S. In this case, the Treaty of 1868, Appendix 2a, with the Navajo Nation.

The Department of Interior Resolution, § 11.30, supra, continues with equality strong language about the exclusiveness of Indian jurisdiction on paternity and support matters, and at the same time prohibiting any thought of concurrent jurisdiction, where it says, "A judgment of the court establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court of Indian Offenses."

The instant case by being allowed jurisdiction in the State Court of New Mexico violates the "two barriers" laid down in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 65 L.Ed. 2nd 665, 100 S.Ct. 2578 (1980). There is a preemption by Federal Law as expressed in the Department of Interior's regulation, 25 C.F.R. 11.30, *and* also an infringement "on the rights of reservation Indians to make their own

laws and to be ruled by them." If commercial transactions and tax questions as in Williams v. Lee, supra, and White Mountain Apache Tribe v. Bracker, supra, can be the subject of federal government protection for the Indians against the taxing authority of the State or the right to sue by a State citizen, then the right of the Indian tribe and tribal government to determine such domestic affairs as Paternity for its members, would call for even greater protection and restraint on the State courts from usurpation by the State judiciary. The Indian Child Welfare Act, supra, could have an application to a Paternity action under the New Mexico Statute Section, Appendix 44a. Esther Antonio's Complaint in Bernalillo County, New Mexico is filed under the New Mexico Statute on Paternity and permits extensive control over the child even beyond the Paternity determination, Appendix 46a. § 40-6-1 Appendix 47a, says: Jurisdiction if acquired on the basis of determining Paternity, does, per se, establish jurisdiction for custody determination. Therefore, submitting to a trial in the New Mexico court under its Paternity statute, is to place the Indian child in the direct court jurisdiction of this particular state court for the entire period of its minority. It also places the Indian mother under the direct control of the court and she could be deprived of custody by the provisions of the New Mexico statutes. App. 46a. Obviously, this is a usurpation of the tribal right to govern its own members, and could affect termination of membership in the tribe. *Santa Clara Pueblo* v. *Martinez* dealt with significant problems of tribe membership and pointed out that non-tribal courts and agencies should not be permitted to affect membership in the tribe or pueblo even though, judged by American standards of equality and due process, the actions

of the tribe or pueblo seem unconstitutional. *Santa Clara* v. *Martinez,* 436 U.S. 49, 56 L. Ed. 2d 106, 98 S.Ct. 1670.

In the case of Fisher v. District Court, Sixteenth Judicial District, In the Matter of the Adoption of Ivan Firecrow, supra, closely resembles the instant case. An Indian child was the direct object of the legal proceeding. It was contended that the congressional policy of furthering Indian self government constituted an impermissible racial discrimination and that to deny Jurisdiction in the Montana court would deny equal protection to Indian Plaintiffs. A similar contention could be raised herein. This court in Fisher, supra, pointed out that state court jurisdiction had been denied even in litigation between Indians and non-Indians in Williams v. Lee, supra, and since the litigation in the Montana Court involved only Indians, at least the same standard must be met before the State Court could exercise jurisdiction. In language that could be applied directly to our case, the PER CURIAM opinion states:

> "The exclusive jurisdiction of the Tribal Court does not derive from the race of the Plaintiff but rather from the quasi-sovereign status of the Northern Cheyene Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self government. *Morton* v. *Mancari,* 417 U.S. 535, 551-555, 94 St. Ct. 2474, 2483-2485, 41 L. Ed. 2d (1974)."

The Indian Child Welfare Act envisions the many and varied problems of inheritance resulting from family changes affecting Indian children. Many unsatisfactory results would follow by allowing the State Courts to proceed in a Paternity action by a Navajo mother for her Navajo child. In *U.S.* v. *Quiser*, 241 U.S. 602, 36 S. Ct. 699, 700 (1916), Justice Van Deventer declared the Opinion of the court in these words:

> "At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses against another to be dealt with, according to their Tribal customs and laws."

It is the child, Rachel Antonio, whose status is going to be affected and potentially could be affected again and again in the New Mexico Paternity proceeding, including her status with her tribe. The decisions of this Court clearly state that her tribal court should decide her status and all the matters that flow from that like inheritance, etc., *Santa Clara Pueblo* v. *Martinez,* supra.

The fact that Esther Antonio, the Indian mother herself invoked the State Court does not change the fact that the "child" Rachel is the real person involved. Jurisdiction cannot be conferred by consent, *Nelson* v. *Dubois,* 232 N.D. 54, (N.D.) 1975. Reference to *Fisher* v. *District Ct. of Montana,* supra, shows that case captioned as "In re: Ivan Firecrow, et al., in the Montana Court, Ivan Firecrow being the Indian child involved. The caption indicates the true nature of the proceedings herein even though this case was styled Esther Antonio vs. the alleged father. The "Indian child" Rachel, has been forced into State Court.

"Inheritance" is sequential to Paternity". In deciding one, the other may be decided. The mother Esther Antonio is in a Navajo family which has possession of reservation land, Appendix 21a. The child Rachel is in that family at least now. Can the child be forced into a State Court for a state decree which could affect her tribal rights? *Jones* v. *Meehan,* 175 U.S. 1, 44 L.Ed. 49, 20 S.Ct. 1 and other cases alleged therein decide that land of the Shawnee Tribe descended according to the law of the Indian woman's tribe and not according to the law of Kansas. The Jones vs. Meehan ruling went further and held that rights, under a lease of land granted by the United States to an Indian, "could not be devested by any subsequent action of the lessor, or of Congress, or of the Executive Department." It is true that Indian land is not the subject matter of Esther Antonio's lawsuit in the State Court of New Mexico, but it could affect reservation land. It could be involved in this State Court Paternity claim since the State Court has continuing jurisdiction over both the "child Rachel" and "the Mother Antonio" under the Statute, App. 46a.

The reality of Pueblo Indian sanctions against their own members, who do not adhere to the rules of the Pueblo, is stated in the facts of Santa Clara Pueblo v. Martinez, supra. The Navajo Indian Tribal reaction to the Paternity suit in Bernalillo County, New Mexico State Court, which is in direct violation of the Tribal Resolution, supra, that jurisdiction is with the Navajo Courts, could have repercussions upon both Rachel and Esther despite the absence of intent by Rachel "the child". Certainly the State District Court of New Mexico would be powerless to alter the results of Tribal disapproval, Santa Clara Pueblo vs. Martinez,

supra. The State Court is indifferent to these consequences, and the expression that it "the State of New Mexico" was a source of "delegated power" to the Federal Government has a forbidding note about the realization of Indian sovereignty. Justice Miller in U.S. vs. Kagama, 18 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109, in speaking of Indian communities said "They have no allegiance to the states and receive from them no protection. Because of the local ill feelings, the people of the states where they are found, are often their deadliest enemies. From their very weakness and helplessness, so largely due to the coure of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection and the power". We request the use of that protective "power" in this appeal.

As defined in the Indian Child Welfare Act, the status of a person as an Indian can be determined by "one parent". Therefore even by the Indian Child Welfare Act, Esther Antonio as parent could and did establish Rachel as an Indian by giving her a census number in the tribe. The white man's concept of illegitimacy and the social stigma is alien to Indian life. Appendix 19a. We submit that *everything* about the *only* two persons, who could figure into jurisdiction in a paternity case in State Court, is Indian.

When this is coupled with the two universal concepts of preventing any state action which tends to diminish tribal sovereignty over its members and the preemptive role of the Federal Government and Congress over the State and further established by the Disclaimer by New Mexico in its Enabling Act, we submit that jurisdiction does not exist. Although the Enabling Act of New Mexico refers to a denial of

jurisdiction by the State over Indian lands, it could apply to this case as an adjunct to the paternity action since property rights on the reservation could be a result of the paternity determination. *Chino* v. *Chino,* 90 N.M. 203, 561, P.2d 476 (1977).

We mention the public policy of the State as a possible ground for asserting jurisdiction in paternity actions.

This policy is not the welfare of the child, but that the taxpayers will be kept from supporting the child as a public charge. Even if this taxpayers savings is adequate in a paternity case, the proper entity to bring the actions is the State and the New Mexico statute expressly allows for this. Appendix 45a. The Journal of Family Law, University of Louisville School of Law, Vo. 19, Number Three (1980) is wholly devoted to the issues involved in paternity actions and critically points out the sad results that can and have occurred to the parties involved while trying to lower the number of children who are public charges to the taxpayer.

Because the New Mexico Courts Have Claimed a Constitutional Right Which Belongs to the U.S. Government, In Taking Jurisdiction the New Mexico Court Said:

> This court is not bound by any federal regulations in terms of a paternity suit.
>
> * * *
>
> I don't think that the State of New Mexico has delegated to the federal government exclusive jurisdiction over matters involved in this Court in a paternity suit in the State of New Mexico. In exercising the sovereignty this state has retained and the fact this particular plaintiff has chosen to submit herself to the jurisdiction of this Court, I think is a valid exercise and proper, and your motion to dismiss for lack of jurisdiction is denied.

The reasoning by Judge Stowers indicates a lack of comprehension of Indian Law. From the landmark decision of *Worcester* v. *Georgia*, 31 U.S. 515 (1832) to the present, a basic principle has been involved in all cases of Indian jurisdiction: the states only have such jurisdiction over Indians as Congress permits them to exercise. This principle was recently recognized by the New Mexico Supreme Court in the *Chino* case, supra, at 206, when it was held that "the state may not assume jurisdiction without congressional or tribal authorization." The "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172, 36 L.Ed.2d 129, 93 S.Ct. 1257, 1262 (1973).

Judge Stowers' analysis is incorrect when he finds there is jurisdiction because the State of New Mexico has not delegated exclusive jurisdiction to the federal government. His analysis is backwards: the issue is what jurisdiction the federal government allows the states to exercise over Indians, *not* what the state allows the federal government to exercise. *Chino*, supra, at 206. The Navajo Tribe was once a sovereign nation; its relations with the State of New Mexico are governed by applicable treaties. *McClanahan* v. *Arizona State Tax Commission*, supra at 168.

Judge Stowers' analysis is also incorrect in finding that there is jurisdiction because "this particular plaintiff has chosen to submit herself to the jurisdiction of this Court." As *Nelson* v. *Dubois*, supra, indicates a state court does not have jurisdiction even if a particular Indian party consents to its jurisdiction. The state court lacks subject matter jurisdiction, as well as personal jurisdiction. Subject matter jurisdiction cannot be waived by the parties.

The State Court's constitutional inaccuracy signifies a failure to recognize the sovereignty and existence of the Indian tribe and its power to govern its members. It also fails to recognize the Federal Government's authority over Indian affairs and the rejection by the State of New Mexico in its Enabling Act.

This State Court's attitude is directly counter to the Treaty of 1868 between the United States and the Navajo Nation and Tribe of Indians. App. 31a.

Jurisdiction Cannot Depend on the Defendant, The Alleged Father, Who Denies It

Whether the Defendant who denies Paternity belongs in Court at all is to be determined only at the conclusion. If jurisdiction is based on the Defendant, then this is a unique legal situation as a defense verdict establishes that the case never belonged in the court in the first place.

The lack of certainty that a Plaintiff's verdict as a Paternity is a biological fact compounds the problem. See Journal of Family Law, University of Louisville, School of Law, Vol. 19, Number Three, 1980-81.

Paternity actions are somewhat unique in that the result may be to name "a" father but not "the" father. At page 493, in Journal of Family Law, we find the following: "In two studies well over a third of the disputed cases and eighteen of the undisputed cases were initiated against Defendants who were not "the fathers". We submit that jurisdiction should not depend on the father, and this case, jurisdiction should now depend on the father being a citizen of the State.

The Navajo Tribal Code of Law Expressly Mandates Jurisdiction for Its Own Courts

The following provision of the Navajo Tribal code is involved: "By Resolution CJA-1-5, the Navajo Tribal Council adopted as Tribal Law the regulation of the Department of the Interior contained in 25 C.F.R. § 11.30 which states: The Court of Indian Offenses shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child."

The following Regulation is involved in the appeal. 25 C.F.R. § 11.22 states:

> "The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and all other suits between members and non-members by stipulation of both parties . . .".

It refers to jurisdiction over a "defendant" who is a member of the tribe, but the person who is the most affected by the case in State Court is the Indian Child, Rachel Antonio, who is made the direct object of the mother's action without her consent. This outweighs the fact that the alleged father is the named defendant.

Determination of Blood Relationship Is the Most Fundamental Right of the Indian Tribe

To allow another governmental entity, in this case, the State of New Mexico, to invade this most sacred aspect of the Indian Nation is to strike at the existence of the tribe. It is an *Indian* child admittedly. App. 34a.

The entire objective of the Indian Child Welfare Act pages is to prevent the assimilation of Indian

children into the non-Indian families. Having jurisdiction retained in Tribal Court is the way this is mandated. The exercise of state power upon Indian children goes directly counter to the congressional policy. Holding out the prospect of money "support" is not a ground to avoid Tribal authority.

The Court Denied the Use of the Fifth Amendment in This Paternity Suit

As an additional point, State Trial Judge Stowers ruled that the Fifth Amendment to the United States Constitution did not apply to the Paternity action because it was a civil case. This could be a by product of his statement on Indian jurisdiction that the State has not delegated any such power to the Federal government. However the application of the restraints of the Bill of Rights to the States by the 14th Amendment, (U.S. Const.) is established. The privilege against self-incrimination, Amendment V to the U.S. Constitution is included.

This matter arose in the deposition of the defendant, which would have vitality at the scheduled trial in February 1982 if jurisdiction exists. The court ordered answered a series of questions which had been reduced to written interrogatories and to which the Fifth Amendment had been raised, Appendix 40a.

It is certain that many of these questions directly affect the alleged sexual acts of the parties and similar matters, see Appendix 42a.

We submit that a defendant in a Paternity action has the protection against self-incrimination. An examination of the New Mexico Illegitimacy and Support Act, Appendix 43a, shows several criminal charge

possibilities, all stemming from the determination of Paternity with coercive and criminal powers provided for within the Act and by use of the result of a verdict against the Defendant.

The trial judge made distinction between the Fifth Amendment stating it does not apply to civil action. There is a serious question as to whether a Paternity action such as those authorized under New Mexico Statute, supra, is civil or criminal, see Journal of Family Law, Page 478, supra. In any event it has been determined that it does apply.

The case of State vs. Zamora, 84 N.M. 245, 501 P.2d 689, illustrates how firm the courts of this state are in resisting attempts by some type of distinction to undermine the protection afforded people not to incriminate themselves. That case says,

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might by dangerour because injurious disclosure could result. The trial judge in appraising the claim, 'must be governed as much by his personal perception of the peculiarities of the case as by the facts in evidence.' See Taft, J., in Ex parte Irvine, 74 F. 954, 960 (C.C.S.D. Ohio, 1896)."

Later on the Court says,

> "When a witness is asked a question the answer to which could show that he had already committed a crime (perjury at a prior trial or hearing) his refusal to answer is permissible almost by the definition of self-incrimination. However, he is still criminally accountable for his perjury, but he may not be convited out of his own mouth over his

> claim of privilege. United States v. Wilcox, supra; United States v. Orta, 253 F.2d 312 (5th Cir. 1958); Glickstein vs. United States, 222, U.S. 139, 32 S.Ct. 71, 56 L.Ed. 128 (1911).

In view of the nature of this paternity suit, we submit that the above quote justifies refusal to answer "almost by the definition of self-incrimination."

In 52 Virginia Law Review, 322 (1966), there is an article entitled "Use of the Privilege Against Self Incrimination in Civil Litigation." The opening sentence is as follows:

> "Although by its very nature the privilege against self-incrimination applies primarily to a defendant in a criminal prosecution, it is also available to a witness or party in a civil proceeding when there is a possibility of subsequent criminal prosecution.[1] Citing (1924); Wilbanks v. Wilbanks, 220 Ga. 665, 141 S.E. 2d 161 (1965)."

There seems to be no reason nor any authority which would bar the use of the privilege against self-incrimination in this case. Even the distinction between the civil litigation and criminal prosecution would seem to favor holding this paternity action to be a criminal or quasi-criminal proceeding. Support for this position exists from the reading of Section 40-5-19, Appendix 46a, which indicates that the court has continuing jurisdiction "until the judgment of the court has been completely satisfied," and grants to the court coercive powers which include "imprisonment in the penitentiary for not exceeding two years," under Section 40-5-21, Appendix 46a. So in this instance the paternity suit, although instituted by a civilian, nevertheless gives to the court power to punish by imprisonment in the penitentiary for the failure to carry out a judgment that could be issued in this case.

New Mexico itself has ruled on the matter, that Fifth Amendment privileges apply in civil proceedings. A defendant in a civil lawsuit is privileged against answering questions where the answers might tend to incriminate him in future criminal proceedings. Rainbow Baking Co. v. Apodaca, 88 N.M. 501, 542 P.2d 1191 (C.A. 1975), cert. den. 89 N.M. 6. See also Abramowitz vs. Voletsky, et al., 262, N.Y. S.2d 991, (1965)., which is a civil case where the answers are not given in a deposition on the grounds of self-incrimination, the motions stating: "There is no claim by plaintiff that the answers to the questions propounded might not incriminate or tend to incriminate the defendant. It appearing that the claim of self-incrimination is justified, defendant's answer may not be stricken." Citing cases: McKelvey v. Freeport Housing Authority, 29 Misc. 2d, 140, 220, N.Y.S.2d 628; Barbato v. Tuosto, 38 Misc. 2d 823, 238 N.Y.S.2d 1000; see also Levine v. Bornstein, 13 Misc.2d 161, 174, N.Y.S.2d, affd. 7 A.D.2d 995, 183, N.Y.S.2d 868, affd. 6 N.Y.S.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921. Also see, Kastigar v. U.S. (1972), 406 U.S. 441, 32 L.Ed. 2d 212, 92 S.Ct. 1653. Re Gault (1967), 387 U.S. 1, 18, L.Ed. 2d 527, 87 S.Ct. 1428. Lefkowitz v. Turley (1973), 414 U.S. 70, 38 L.Ed. 2d 274, 94 S.Ct. 319. Re Paternity: Kaneshiro v. Belisario, 51 Hawaii 649, 466 P.2d 452 (1970). (in paternity suit, it was a reversible error for plaintiff to comment on defendant's assertion of his right against self incrimination while on witness stand.

This Fifth Amendment privilege was included within the same Writ to the Supreme Court of New Mexico App. 47a & 48a as the matter of Indian Jurisdiction in a Paternity Suit. It was equally denied by the Order of Supreme Court. App. 1a.

The State Court's refusal to draw the privilege against self-incrimination as stated thusly, "I understand the position taken the Defendant in this case; however, I don't see this as a quasi criminal case at all. I see this basically as a civil action to establish Paternity. I don't think that the questions that are asked for purposes of establishing an acquaintanceship or relationship, intercourse, or matters of that kind are protected by the Fifth Amendment, App. 39a.

CONCLUSION

For the reason that jurisdiction by the State of New Mexico Courts over Paternity of a Navajo child is in violation of the Treaty of 1868 and is against its validity, 28 U.S.C. § 1257, and because the reason stated for state jurisdiction questions and denies the right of the United States and the Navajo Nation to make the Treaty as independent sovereigns, we request that the appeal be granted.

Since the question of the privilege against self-incrimination under the Fifth Amendment was included within the Writ of Prohibition it also is included in the appeal, Appellant asks that the appeal be granted. App. 47a, 48a.

Respectfully submitted,

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